Filed 2/18/09 Taxpayers for Responsible Land Use v. San Diego CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TAXPAYERS FOR RESPONSIBLE LAND USE et al., Plaintiffs and Appellants, v. CITY OF SAN DIEGO et al., Defendants and Appellants; HILLEL OF SAN DIEGO, Real Party in Interest and Appellant.	D052084 (Super. Ct. No. GIC867378)

APPEAL from a judgment of the Superior Court of San Diego County, Linda B. Quinn, Judge. Reversed in part and otherwise affirmed as modified.

Hillel of San Diego (Hillel) applied to the City of San Diego (City) to purchase a small piece of City property near the University of California, San Diego (UCSD), and to obtain the approvals necessary to build a Jewish student center there. After the City approved the sale and adopted a mitigated negative declaration for the student center

project pursuant to the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq. (CEQA)), Taxpayers for Responsible Land Use and others (collectively, Taxpayers) filed a combined complaint seeking damages and injunctive relief and petitions for writ of mandate under CEQA and Code of Civil Procedure sections 1085 and 1094.5.

Hillel and the City (collectively, the Appellants) appeal a judgment granting Taxpayers' CEQA writ based on a finding that the evidence established a fair argument the project may have significant impacts on the environment. They contend there was no substantial evidence to support that finding and thus the court erred in granting the writ. They also contend that the court abused its discretion in finding Taxpayers to be the prevailing party and awarding all of Taxpayers' requested costs.

Taxpayers cross-appeals the judgment as to the denial of its request to set aside the City's sale of property to Hillel. In this regard, it argues that (1) the sale was an integral part of the overall project and thus the court erred in severing the sale out from the project for CEQA purposes and (2) the City in any event failed to comply with its own ordinances and procedures governing the approval of a sale of City property. Taxpayers also appeals the judgment insofar as the court (3) rejected its contentions that the City failed to make the requisite findings to support its decision vacating public rights-of-way adjacent to the property and (4) summarily adjudicated its waste claims in the Appellants' favor, which it contends was based on a misapplication of the exclusive remedy doctrine. The Appellants respond that a number of Taxpayers' arguments cannot now be heard because its cross-appeal did not create jurisdiction in this court over those issues.

We reject the Appellants' jurisdictional challenge and find that the superior court erred in granting summary adjudication of Taxpayers' waste causes of action. We also modify the judgment to require the Appellants to prepare an environmental impact report (EIR) pursuant to CEQA relating to the possible impacts of the project on traffic and parking, biological resources and aesthetics and community character. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In the 1950s and 1960s the City dedicated a portion of Pueblo Lot 1299 in La Jolla for street construction purposes. Site 653 is a 15,341 square foot triangular segment of Pueblo Lot 1299 that remained after the street construction; its three sides are bounded by La Jolla Village Drive, La Jolla Scenic North and La Jolla Scenic Way and its pointed end is adjacent to Torrey Pines Road. Site 653 remains vacant and unused and is currently zoned for single-family residential use. Site 653 is situated with the UCSD campus to the north, a neighborhood of single family residences known as La Jolla Highlands to the south and a residential complex to the east.

Hillel provides religious services, student programs, educational resources and facilities to Jewish students attending colleges and universities in the San Diego area. It operated a limited student facility at UCSD's International Center, but desired to build its own student center so that it could offer more expansive services, including weekly Friday evening Shabbat services, periodic educational events and special observances on Jewish high holidays.

In 2000, Hillel responded to a public request for proposal by the City's Real Estate Asset Department (READ) regarding the potential sale or lease of Site 653; the only other proposal submitted in response to the City's request was made by the La Jolla Highlands Homeowners Association, which proposed maintaining Site 653 as open space. In November 2000, after receiving a report from READ that the site was not desirable as an open space parcel, the City authorized READ to enter into exclusive negotiations with Hillel regarding the lease or sale of Site 653.

In 2002, a donor purchased a single family residence at 8976 Cliffridge Avenue, which is near Site 653, for Hillel's use. Hillel thereafter created a two-phase plan for the development of a student center on Site 653 (the Project), the first phase of which involved Hillel's continued operation of an administrative office at the 8976 Cliffridge Avenue residence and its provision of limited religious services there.

The second phase of the Project involved the construction of a one-story, 12,100 square foot student center, with a 17,000 square foot underground parking facility, on Site 653 and certain adjacent property subject to City rights-of-way (referred to collectively with Site 653 as "the Project site"). Upon completion, the student center would serve as the site for the religious services, with the capacity to accommodate up to 350 attendees for occasional special events, and the 8976 Cliffridge residence would revert back to residential use.

The second phase of the Project required Hillel to obtain a site development permit, as well as the City's approval of a planned development permit that allowed deviations from City regulations that would otherwise apply. For example, the development plan

called for the phase II construction to provide 40 on-site parking spaces, supplemented by off-site parking arrangements with the owners of other lots in the area, neither of which was permitted by the Land Development Code provisions governing single family residential zones. The plan also envisioned the construction of an underground parking lot with a gated garage entrance accessible from southbound La Jolla Scenic Way, but the entrance was not as wide as the code required. The Project also required the City's approval of a deviation from its street design manual.

Because Site 653 was small and oddly shaped, phase II of the Project also required a vacation of City rights-of-way over approximately 21,000 square feet of land adjacent to the site. The Project also called for the elimination of the existing driveway for the 8976 Cliffridge property, thus necessitating a lot line adjustment for the property.

Hillel applied for the requisite permits and the rights-of-way vacation in January 2003, and the City conducted an initial assessment of the potential environmental impacts of the Project. Concluding that the Project might have potential significant impacts on paleontological, archaeological and biological resources, water quality, noise, transportation and parking, City staff requested further information, including a biological survey and a traffic study, from Hillel.

In response to the City's requests, Hillel hired RECON to study the potential project biological impacts and Kimley-Horn & Associates (K-H) to study the potential traffic and parking impacts of the Project. In June 2004, RECON issued a final report concluding that no biological impacts "are expected to occur" as a result of the Project. K-H issued its traffic and parking impact study (the Traffic Study) at about the same time, concluding that

the Project would not significantly impact traffic and any potentially significant parking impacts could be mitigated by shared parking agreements for off-site parking and the implementation of transportation and parking demand management measures, but also recommending that parking evaluations be conducted for a year after the facility became operational.

Based on the additional information provided by Hillel, the City prepared an initial study of the Project; that study concluded that the only potential significant impacts of the Project related to paleontological resources and parking, that those impacts could be mitigated to a level of insignificance and that the City should issue a mitigated negative declaration for the Project. (See Pub. Res. Code, § 21080, subd. (c)(2).) Thereafter the City's Land Development Services Department staff prepared a draft mitigated negative declaration requiring 19 mitigation measures (15 of which related to paleontological resources and 4 of which related to parking) and circulated the draft for public comment.

Local planning groups, including the La Jolla Shores Planned District Advisory Board, the La Jolla Community Planning Association and the La Jolla Town Council, considered the draft mitigated negative declaration and the Project; each one recommended against the adoption of the draft declaration and the approval of the Project. Similarly, when the City's Planning Commission considered those matters in February 2005, it voted, unanimously, to recommend that the City not issue a mitigated negative declaration for the Project or grant approvals therefor, specifically based on its concerns regarding the Project's incompatibility with the neighborhood and the limited

available on-site parking. The City also received several petitions and hundreds of comment letters from the public objecting to the Project on these and other grounds.

While the draft mitigated negative declaration and the Project proposals were being vetted to the public, the Land Development Services Department revised the draft declaration to impose 12 (rather than 4) parking mitigation measures; the new measures required in part that Hillel obtain shared parking agreements with off-site providers, that the number of off-site parking spaces be increased to 66 (from 27) for weekly Shabbat services and that Hillel provide shuttle service from any off-site parking lot located 600 feet or more from the site. The department did not, however, release the revised draft declaration for public comment.

Despite the widespread community opposition to the Project, the City Manager recommended that the City Council certify the mitigated negative declaration and approve the related permits and rights-of-way vacation. In August 2005, however, the City Attorney issued an analysis of the environmental impacts of the Project and opined that an EIR was required, particularly noting that the parking impacts of the Project were not adequately mitigated. The Land Development Services Department again revised the draft mitigated negative declaration (which it denominated the "revised final" declaration); although the revised final draft changed all of the parking mitigation measures required for the Project, the department again declined to recirculate that draft for public comment because the "correction[s]" made therein did "not change the determination of any of the environmental issues associated with [the Project]."

The City requested, and in April 2006 received, updated appraisals for a sale or lease of Site 653 at $940,000 and $7,442 per month, respectively. Hillel executed a proposed purchase agreement and a proposed lease agreement for Site 653 in accordance with the revised appraised values. The proposed purchase agreement specified that the closing of the transaction was contingent on the City's approval of Hillel's applications for the rights-of-way vacation, a planned development permit and a site development permit for the Project.

That same month, the City held a hearing regarding the Project and the Site 653 sale. Numerous witnesses testified in opposition to the Project and the sale and some presented evidence suggesting that Site 653, when considered with the vacated rights-of-way, was actually worth $2.4 to $3 million.

The City Council amended the draft mitigated negative declaration and the related permits to require increased or additional mitigation measures, including that the Project provide a minimum of 68 (rather than 40) on-site parking spaces. The council concluded that the Project, as mitigated by the newly amended mitigation measures, would not have a significant environmental impact and certified the amended mitigated negative declaration (the Mitigated Negative Declaration). It also approved the planned development permit, the site development permit and the rights-of-way vacation for the Project.

Taxpayers promptly filed combined petitions for writ of mandate and a complaint for injunctive relief and damages, asserting the following causes of action:

> #1: for a CEQA writ of mandate, alleging that the City violated CEQA by disregarding substantial evidence of a fair argument that the Project would have significant environmental impacts (including those on traffic, parking, aesthetics, open space and geology) and improperly describing the Project as omitting the sale of Site 653;
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> #2: for an administrative writ of mandate, alleging that the City abused its discretion by approving the planned development permit for the Project despite the Project's noncompliance with applicable zoning and land use laws;
>
> #3: for an administrative writ of mandate, alleging that the City abused its discretion in authorizing the vacation of the rights-of-way without making the findings required by state law and the City's Municipal Code;
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> #4: for an administrative writ of mandate, alleging that the City abused its discretion by approving a site development permit for the Project without making the requisite findings and despite the fact that the Project did not comply with the applicable zoning designation for the Project site;
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> #5: for a traditional writ of mandate, alleging that the City failed to comply with its mandatory duties imposed by the Municipal Code in authorizing the sale of Site 653 to Hillel;
>
> #6: for an injunction prohibiting the sale of Site 653; and
>
> #7: for damages against the individual City Council members for waste of public property arising out of their failure to exercise due care in approving the sale.

Taxpayers made an ex parte application for a temporary restraining order to enjoin the City from selling Site 653 to Hillel; after the court denied its application, Taxpayers set a motion for similar preliminary injunctive relief.

While the motion was pending, the City and Hillel entered into a revised written agreement relating to the sale of Site 653. Like the original purchase agreement signed by Hillel, this agreement provided that the closing of the transaction was contingent on

Project approval, but it also included a new provision acknowledging the pendency of Taxpayers' action and providing that if the sale was invalidated as a result thereof, Hillel would return Site 653 to the City and the City would refund the purchase price less certain costs.

The superior court thereafter denied Taxpayers' motion to enjoin the sale pending trial, finding that there was no irreparable harm since the purchase contract specifically authorized a rescission of the transaction and return of Site 653 to the City in the event Taxpayers prevailed in the action and that Taxpayers had not met its burden to show its likelihood of prevailing in the action. The sale transaction closed in late 2006.

In March 2007, the court tried Taxpayers' request for a CEQA writ of mandate. It found that there was substantial evidence to support a fair argument of significant impacts on traffic and biological resources. The court originally ordered the City to set aside its approvals of the Project permits and the sale of Site 653 and to prepare an EIR for the Project; however, it later revised its order so as to sever the sale of Site 653 from the application of the CEQA writ (thus allowing the sale to stand) and to require the City to conduct further proceedings in compliance with CEQA without specifying that the preparation of an EIR was required. The court subsequently granted a motion by the Appellants for summary adjudication of Taxpayers' sixth and seventh causes of action for injunctive relief and damages.

In October 2007, the court entered judgment (1) issuing a peremptory writ of mandate directing the Appellants to set aside the approvals of the Mitigated Negative Declaration, the planned development permit and the vacation of the rights-of-way and

remanding those matters for reconsideration in light of CEQA, (2) denying Taxpayers' petitions for writ of mandate as sought in causes of action numbers 2 through 5, and (3) granting the Appellants' motion for summary adjudication of causes of action numbers 6 and 7. All parties filed cost memoranda, although the court ultimately awarded Taxpayers costs of $28,264.52 as the prevailing party. The parties stipulated to defer the issue of attorney fees until after the resolution of the current appeals, which then ensued.

DISCUSSION

I. THE APPELLANTS' APPEAL

The Appellants' appeal challenges the court's issuance of a writ of mandate pursuant to CEQA, contending that the evidence is insufficient to support a finding of potentially significant environmental impacts, and its award of costs to Taxpayers as the prevailing party. After explaining the general principles of CEQA, we discuss these arguments in turn below.

1. *CEQA*

CEQA requires that a public agency determine whether a project may have significant environmental impacts before it approves the project. (Pub. Res. Code, § 21151, subd. (a); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79.) Pursuant to CEQA, an agency must require an EIR for any project that "*may* have a significant effect on the environment," unless a categorical exemption applies. (Pub. Res. Code, § 21151; see also Pub. Res. Code, §§ 21002.1, 21061, 21100; Cal. Code Regs., tit. 14, § 15000 et seq. (hereinafter Guidelines), §§ 15080-15096, 15120-15132, 15160-15170, 15358, 15362, 15382.) The preparation of an EIR is described as the "heart" of CEQA

because it is the principal method for bringing information about the environmental impacts of a particular project to the attention of the agency and the public. (*No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d at p. 84.)

Where an agency determines that a project "would not have a significant effect on the environment," it must prepare a negative declaration, briefly describing the reasons for its determination. (Pub. Res. Code, § 21080, subd. (c); Guidelines, § 15371.) Such a determination is appropriate only if "[t]here is no substantial evidence in light of the whole record before the [public] agency" that a significant environmental impact may occur as a result of the proposed project. (Pub. Res. Code, § 21080, subd. (c)(1); see also CEQA Guidelines, § 15070, subd. (a).) A "significant effect" is a substantial, or potentially substantial, adverse [physical] change in the environment. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945.) If there is substantial evidence that the project will have a significant environmental effect, but that effect may be reduced to a level of insignificance by implementing mitigation measures, the agency may adopt a mitigated negative declaration allowing the project to go forward subject to those measures. (Pub. Res. Code, §§ 21064.5, 21080, subd. (c)(2); *Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1331.)

In reviewing an agency's decision to adopt a negative declaration or a mitigated negative declaration, a court (whether at the trial or the appellate level) must determine whether there is substantial evidence in the record to support a "fair argument" that a proposed project may have a significant effect on the environment. (*Citizens for*

Responsible & Open Government v. City of Grand Terrace, supra, 160 Cal.App.4th at p. 1331; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1399-1400.) The fair argument standard creates a "low threshold" for requiring an EIR, reflecting a legislative preference for resolving doubts in favor of environmental review. (E.g., *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316-1317; see also *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 85.)

The question of whether the evidence establishes a fair argument that a project may result in significant environmental impacts is one of law. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928, citing Guidelines, § 15064, subd. (f)(1).) A reviewing court does not give any deference to the agency's determinations, except insofar as the agency has made express credibility findings (*Sierra Club v. County of Sonoma, supra,* 6 Cal.App.4th at pp. 1317-1318), but determines the matter de novo. (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1579; compare *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106 [where a court reviews an agency decision to certify an EIR, it presumes the correctness of the decision].)

Evidence supporting a fair argument may consist of facts, reasonable assumptions based on fact, or expert opinions supported by fact but not "argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (Pub. Res. Code, § 21080, subd. (e)(2); Guidelines, § 15384, subds. (a), (b).) If substantial evidence exists to support a fair

argument that a significant effect may result from the project, the agency is required to prepare an EIR, irrespective of whether there is other substantial evidence in the record to the contrary. (Pub. Res. Code, § 21080, subd. (d); Guidelines, §§ 15063, subd. (b)(1), 15074, subd. (b); *Citizens for Responsible & Open Government v. City of Grand Terrace*, *supra*, 160 Cal.App.4th at p. 1331.)

The requirement that an EIR be prepared does not preclude a public agency from ultimately approving a project that will have significant, unmitigatable environmental impacts. (See Pub. Res. Code, § 21081, subd. (b); Guidelines, § 15093, subd. (a); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) CEQA does not require a public agency to favor environmental protection over other considerations, but does require it to disclose and carefully consider the environmental consequences of its actions, mitigate or avoid adverse environmental effects if feasible, explain the reasons for its actions, and afford the public and other affected agencies an opportunity to participate meaningfully in the environmental review process. Rather, its purpose is to ensure that public officials are aware of the environmental consequences of decisions they are considering making and to inform the public of the basis for the decisions that are ultimately made, thereby promoting accountability and informed self-government. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.)

2. *Does Substantial Evidence Support a Fair Argument of Significant Environmental Impacts?*

A. Traffic and Parking Impacts

i. Background

Based on various surveys, including surveys of Hillel's experience in providing services at the UCSD International Center and at other University of California campuses and of Jewish students at UCSD, the Traffic Study concluded that 19 percent of students attending Shabbat services at the student center would drive, with two people in each car, and that this would result in 141 total daily trips (38 of which would be students arriving during peak hours) attributable to the Project. The report noted that certain special events would occasionally generate up to 75 additional daily trips, but that those infrequent large gatherings did not reflect the Project's impacts under normal circumstances and thus it did not consider those trips in determining the traffic impacts of the Project or the steps necessary to mitigate such impacts.

Traffic is rated based on its level of service, which ranges from "A," which indicates free flowing traffic conditions, to "F," for jammed traffic conditions. (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 623.) The Traffic Study indicated that, with the exception of Torrey Pines Road south, the roadways adjacent to the Project site were currently operating at an "E" level of service and were expected to operate at an "F" level of service in the near term, with or without the project. Thus, the report concluded that the Project's traffic impacts would be less than significant and did not require mitigation.

The report did acknowledge, however, traffic circulation impacts resulting from the limited accessibility of the parking lot entrance (only from southbound La Jolla Scenic Way) and the fact that students would be required to show identification before being permitted to pass through the garage gate. Based on the assumption that 19 vehicles would arrive at the facility between 6:30 and 7:00 p.m. on Friday nights (at an average of one vehicle every 95 seconds), the report recommended that the gate be placed 25 feet back from the curb and that the curb be painted to preclude parking "to ensure that inbound vehicles do not stack into the outer southbound through lane on La Jolla Scenic Way[.]"

As to parking, the Traffic Study noted that the Project included 40 on-site parking spaces, but would also result in the loss of 12 to 15 existing on-street spots. Although it acknowledged that the estimated parking demand from the Project would require up to an additional 75 spaces for special events, the report concluded that on weekends and University holidays, students could (and should) be directed to park at UCSD's P102 parking lot, which was nearest to the Project site and which had "abundant parking availability at each of the times of our observations." The report recognized, however, that despite the availability of on-site parking, some students would park on neighboring residential streets but that the effect of this would be relatively minor and did not require mitigation.

The Traffic Study concluded that the Project would not significantly impact traffic and any potentially significant parking impacts could be mitigated by shared parking agreements and the implementation of transportation and parking demand management measures. It also specified, however, that Friday night post-occupancy parking

evaluations should be required for one year after completion of the phase II facility and that if those evaluations showed that parking demand was an issue, appropriate measures, including the use of a shuttle service, could be taken to address any deficiency.

ii. Analysis

The Appellants contend that there is no substantial evidence in the record to support a fair argument that the Project would have a significant impact on traffic or parking, while Taxpayers challenges the sufficiency of the Traffic Study as an informational document on either issue.

As to traffic, the parties focus on the potential impact of increased pedestrian traffic from the Project. The Appellants contend that the trial court improperly relied on statements by two local residents that (1) increased pedestrian traffic alters traffic light cycles and (2) the increased number of pedestrians crossing La Jolla Village North over the course of an hour during peak Friday evening traffic would thus adversely affect the flow of vehicular traffic on that roadway and at its intersections with Torrey Pines Road and La Jolla Scenic Way. By contrast, Taxpayers contends that the Traffic Study failed to analyze the impact of increased pedestrian traffic on vehicular traffic at all and that, in light of the witness statements, this deficiency supports a fair argument of significant traffic impacts.

Statements of area residents based on relevant personal observations on "nontechnical issues" often qualify as substantial evidence for CEQA purposes. (See generally *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 583, & cases cited therein; Guidelines, § 15064, subd. (g); *Mejia v. City of Los Angeles* (2005) 130

Cal.App.4th 322, 339 [recognizing that the administrative record relating to a mitigated negative declaration is ordinarily very limited and that project opponents who challenge a negative declaration often have no expert studies to rely on].) That increased pedestrian traffic extends the duration of signal light cycles at major intersections is readily observable and does not require technical expertise to discern; thus the residents' statements based on their personal observations of the affected intersections constitute competent evidence of such an impact. (See *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 274 [adjacent property owner's testimony regarding traffic conditions based on his or her personal knowledge].)

Contrary to the Appellants' suggestion, although non-expert witness statements must have an adequate factual foundation, such statements need not be supported by corroborating evidence as a precursor to their admissibility. (Pub. Res. Code, § 21082.2, subd. (c); *Pocket Protectors v. City of Sacramento*, *supra*, 124 Cal.App.4th at pp. 932, 937; *Gentry v. City of Murrieta*, *supra*, 36 Cal.App.4th at p. 1417.) In any event, however, the fact that the La Jolla Town Council Foundation criticized the City for failing to evaluate the effect of the increased pedestrian traffic from the Project does tend to corroborate the witness statements on this point.

Even if the statements were not sufficient to establish that pedestrian usage would *lengthen the duration* of the signal light cycles, the Traffic Study's conclusions regarding the severity of the vehicular traffic on the thoroughfares adjacent to the Project site, when considered with the Appellants' own evidence that arrival patterns for Hillel's existing

Friday evening Shabbat services "are typically dispersed" and that attendees "trickle in" over the course of an hour, as well as the Traffic Study's conclusion that it likely overestimated the number of vehicles coming to the Project site, provides evidence of a fair argument that *the number of times* that pedestrians would cross La Jolla Village Drive to attend Shabbat services on Friday evenings might have a significant impact on vehicular traffic.

Implicitly conceding Taxpayers' contention that the Traffic Study did not include an express analysis regarding the impact of the increased number of pedestrians crossing La Jolla Village Drive to get to the facility on vehicular traffic, the Appellants now contend that the analytical software used as the basis for the Traffic Study incorporated the increased pedestrian traffic from the Project. They point to language in the report that the relevant intersections were evaluated using the 2000 Highway Capacity Manual procedures contained in K-M's software program. There are several problems with the Appellants' argument.

First, to the extent they rely on an *overview* of the 2000 Highway Capacity Manual as the basis for its contention, this document is not properly subject to judicial notice. (See Evid. Code, § 452, subd. (h) [permitting judicial notice of facts that are not reasonably subject to dispute and "are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"]; *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145.) Even if it was, we would not be obligated, or inclined, to give effect to such evidence. (*Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1111 [recognizing that CEQA review

is generally limited to matters presented to the governmental agency, i.e., those contained in the administrative record, and that a reviewing court is not required to consider matters outside that record, even if those matters are properly subject to judicial notice].)

Further, the City's responses to public comments about the impact of increased pedestrian crossings, which merely characterized those comments as "address[ing] the merits of the [P]roject, not the accuracy or the adequacy of the [Mitigated Negative Declaration]," belie the Appellants' current contention. If the analysis in the Traffic Study was based on software that factored in the estimated increase in pedestrian traffic from the Project, the City presumably would have said so in responding to these criticisms rather than indicating that the criticisms did not require a substantive response at all. Nor does a review of the Traffic Study itself, which shows an increase of one-tenth of a second in the delay time at the La Jolla Village Drive/Torrey Pines Road intersection as a result of the Project, on its face support a conclusion the increased pedestrian traffic from the Project was factored into the traffic impact analysis.

Notably, the Traffic Study specifically sets forth information as to existing vehicular traffic and estimates and assumptions regarding Project-related increases in such traffic, but does not provide information as to existing pedestrian traffic or assumptions regarding the Project-related increases in pedestrian traffic or the number of students who will arrive by shuttle from the off-site parking areas. The failure to set forth such estimates or assumptions precludes any determination as to whether any were made and, if so, whether any such estimates or assumptions were reasonable. The failure of the Traffic Study to address this potential impact itself supports a fair argument of a

significant effect on traffic. (See generally *Gentry v. City of Murrieta, supra*, 36 Cal.App.4th at p. 1378 [recognizing that a local agency cannot hide behind its own failure to study an area of possible environmental impact and that such a failure may itself support a fair argument of such an impact].)

The Appellants nonetheless argue that any potential impact of increased pedestrian traffic from the Project is de minimis, and thus negates a fair argument of significant project impacts on traffic, in light of (1) the City's amendment of the draft mitigated negative declaration to increase the number of required on-site parking spots from 40 to 68 and (2) the evidence that the La Jolla Village Drive/Torrey Pines intersection is already congested and that many student pedestrians already cross at that intersection. However, because nothing in the Traffic Study or elsewhere in the record establishes either the number and frequency of existing pedestrian crossings at the intersection during the time frames when the students are expected to be coming and going from the facility for weekly Shabbat services or the anticipated increase in such crossings as a result of the Project, it is purely speculative to conclude that the potential impact of pedestrian traffic would be insignificant.

Similar deficiencies exist as to the Appellants' analysis of the parking impacts of the Project. The Traffic Study relied on the availability of parking at UCSD's P102 parking lot, to essentially mitigate parking impacts from the Project. However, as UCSD specifically pointed out in its comments to the draft mitigated negative declaration, the parking surveys that K-H conducted occurred on Friday evenings when there were no scheduled theater performances at the complex, despite the fact that plays are regularly

performed there on Friday evenings (for example, in that year, Friday evening performances occurred in 34 of 52 weeks) and thus the surveys did not adequately address potential Project impacts on parking. The City "noted" UCSD's comments, but did not require Hillel to have K-H conduct representative surveys as a basis for determining whether a fair argument of such impacts existed. Although it later became clear that UCSD was not going to make the P102 lot available for off-site Project parking Taxpayers argues that this is tantamount to deferred mitigation in violation of CEQA, while the Appellants respond that these measures merely reflect an effort to monitor whether circumstances change after the Project is constructed.

Measures to mitigate significant environmental effects are generally to be accomplished not only before the issuance of a mitigated negative declaration, but before the proposed negative declaration is released for public review. (Guidelines § 15070, subd. (b)(1); also *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306-307; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 880-881.) Thus, in many circumstances, an agency requirement that a project applicant adopt mitigation measures derived from information through studies to be conducted *after* project approval will not comply with CEQA. (Guidelines § 15070, subd. (b)(1); *Sundstrom v. County of Mendocino*, *supra*, 202 Cal.App.3d at pp. 306-307, & cases cited therein; also *Gentry v. City of Murrieta, supra,* 36 Cal.App.4th at pp. 1396-1397.)

There are exceptions to this general rule. For example, deferred mitigation may be permissible under CEQA for multistage projects where more than one potential mitigation measure might reduce the project's environmental impact to a point of

insignificance and the determination of which of those will be the most effective cannot be determined until the receipt of information that will only become available after the project is approved. (See *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1450.) Similarly, an agency may approve a project without violating CEQA where practical considerations preclude a determination, as of the time of the approval, of the optimal method of mitigating significant environmental impacts, but such approval is conditioned on specific performance criteria that the ultimate mitigation measures will be required to attain. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275-1276; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1029, & cases cited therein.)

This case, however, does not fall within these exceptions. As evidenced by the record, the information about the parking impacts of the Project is currently available and the Appellants proffer no reason why the development of mitigation measures needs to be left for future assessment. The requirement of extensive additional monitoring and possible imposition of additional off-site parking requirements in this case instead appears to reflect a lack of confidence by the City as to the analysis of the parking impacts of the Project and/or the effectiveness of the mitigation measures it imposed to reduce the Project's impact on parking to a level of insignificance, as does the City's last-minute imposition of significant parking mitigation measures prior to its approval of the Project.

We thus conclude that, based on the nature of the environmental review conducted by the Appellants and the evidence in the record, there is a fair argument that the Project may have significant impacts on traffic and parking.

B. Biological Impacts

Taxpayers contends that the City improperly suppressed the initial report of Hillel's biological consultant and, in doing so, violated the information disclosure requirements of CEQA. We agree.

i. Background Facts

In September 2003, RECON provided the City's Land Development Services Department with its initial biological impact report. The department did not release the report publicly, but instead informed Hillel that RECON's recommendation for a preconstruction focus survey of potential raptor nests "[did not] make sense" and that the report needed to be revised "for consistency with the City's determination that no mitigation is required for biological resources (raptors)." The department also specified that RECON's conclusion that "construction activities [should] be limited to Sept. 1 thru Jan. 31st" must be deleted.

RECON issued its revised report in June 2004, identifying five sensitive bird species that had "low potential" to occur on site, but specifying that "[n]one of . . . species . . . are expected to nest on-site" and "therefore, no impacts to active raptor nests are expected to occur." The report also stated, however, that "[t]he loss of an active raptor nest by removal of a tree or the abandonment of an active nest due to construction activity would be considered a significant impact." Three months later, four of the five eucalyptus trees on

the Project site were removed by a contractor hired by the City in connection with a project to widen La Jolla Village Drive.

ii. Analysis

The City did not include the September 2003 RECON report as part of the administrative record based on its own policy (apparently an informal one) requiring it to disclose only those reports that are circulated for public comment and the Appellants point to the absence of this document from the record as barring any consideration of it. However, the City's purported policy violates Public Resources Code section 21167.6, subdivision (e), which provides that:

> "The record of proceedings [in a CEQA action] shall include, but is not limited to, all of the following items:
>
> "(3) All staff reports and related documents prepared by the respondent public agency and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations adopted by the respondent agency pursuant to this division.
>
> ". . . . . .
>
> "(7) All written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project.
>
> ". . . . . .
>
> "(10) Any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the

> project, and all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division."

(See generally *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26 [while CEQA does not require perfection in terms of disclosure, error does occur if the "failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process"].) Because the City's withholding of the original RECON report was improper, the Appellants cannot be heard to now object that the absence of the document from the record precludes our review of Taxpayers' challenge that the suppression of the original report is direct evidence of bad faith on the City's part.

The Appellants alternatively argue that the subsequent removal of four of the five eucalyptus trees from the Project site eliminates any possibility that the Project may have a significant and unmitigatable impact on biological resources. This argument, however, is not supported by any evidence in the record and, as such, is speculative. Further, our acceptance of this argument would essentially condone the City's wrongful withholding of the initial report. Under the circumstances, we conclude that further analysis of the possible impacts of the Project on biological resources is required.

C. Aesthetics and Compatibility with Community Character

A project's negative effect on the aesthetic, natural, scenic and historical environmental qualities in its vicinity may constitute a significant environmental impact under CEQA. (*Pocket Protectors v. City of Sacramento, supra,* 124 Cal.App.4th at pp. 936-397, citing Pub. Res. Code, § 21001, subd. (b); *Mira Mar Mobile Community v. City*

of Oceanside (2004) 119 Cal.App.4th 477, 492.) In assessing a particular project for this purpose, the relevant question is whether it may have a significant effect on such considerations generally, not whether it may have a significant effect on a few people in particular. (See *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego, supra,* 139 Cal.App.4th at p. 279 [effect of project on the private views of a few adjacent homeowners does not constitute a significant effect on the environment for purposes of CEQA].)

Here, Taxpayers points out that, of the multitude of people who objected to the project, the vast majority did so in part based on the incompatibility between the Project and the surrounding community. The public controversy over the aesthetic impacts of the project centers on: (1) the size, shape and design of the Project relative to the size of the Project site; (2) the height of the east end of the Project relative to La Jolla Scenic Way and the residential area on the east side of that street; and (3) the inconsistency of the proposed structure with the setting and visual character of the surrounding area, which is largely residential.

The Appellants respond that the mere existence of public opposition does not constitute substantial evidence of a fair argument that a project may have a significant impact on the environment. While this response is a correct statement of the law (see Pub. Res. Code, § 21082.2. subd. (b); Guidelines, § 15064, subd. (f)(4); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 621-622), its underlying premise (that the public comments here merely consisted of

generalized opposition to the Project rather than statements regarding possible project impacts on aesthetics) is misplaced.

As is frequently true, the question of whether this Project may have a significant effect on aesthetics and community character is extraordinarily subjective in nature. (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402.) However, there is objective evidence in the record to support the Project opponents' subjective opinions that the Project would have a significant impact on aesthetics and community character. The Project site is small in size and oddly shaped; it is abutted by two roads that are significantly lower than it is (La Jolla Scenic Way and La Jolla Village Drive), making the proposed 12,100 square foot structure to be built on the southeastern part of the site (thus, closest to the residential areas) more prominent in appearance. This evidence is sufficient to support a "fair argument" of significant impacts here. (Guidelines, § 15064, subd. (b); compare *Bowman v. City of Berkeley, supra,* 122 Cal.App.4th at pp. 592-593 [concluding that the aesthetic difference between a four-story and a three-story building on a commercial lot on a major thoroughfare in a developed urban area is not a significant environmental impact, even under the fair argument standard].)

D. Conclusion

Substantial evidence in the record supports a fair argument that the Project may have significant environmental impacts on traffic, parking, biological resources and aesthetics and community character and thus the City erred in approving the Mitigated Negative Declaration for the Project. (Based on this conclusion, Taxpayers' arguments

on its cross-appeal that the City failed to adequately consider the public's comments to the draft mitigated negative declaration and violated CEQA by not recirculating that document after imposing additional mitigation measures are moot.)

E. The Consequences

When a court finds that a public agency has violated CEQA, it must do one or more of the following: (1) mandate that the agency vacate its determination, finding, or decision in whole or in part; (2) if the court finds that a specific project activity will prejudice the consideration or implementation of mitigation measures or project alternatives and could result in an adverse physical environmental change, mandate that the agency and any real party in interest suspend specific activity until the agency complies with CEQA; or (3) mandate the agency take specific action necessary to comply with CEQA. (Pub. Res. Code, § 21168.9, subd. (a).) In the latter instance, the court must specify what action by the agency is necessary to comply with CEQA but cannot direct the agency to exercise its discretion in a particular way. (Pub. Res. Code, § 21168.9, subds. (b), (c).)

Where substantial evidence in the record supports a fair argument that a project may have a significant environmental impact and there is no basis on which the agency would be entitled to disregard that evidence in the event of reconsideration of the matter, the appropriate relief is to order the agency to set aside its adoption of a negative declaration and to prepare an EIR. (See, e.g., *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 415; *Stanislaus Audubon Society, Inc v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 160.) Where, on the other hand, the agency

might be able to adopt an amended negative declaration after reconsidering the matter, the appropriate relief is to set aside the agency's decision and return the matter to the agency for further consideration. (See, e.g., *Gentry v. City of Murrieta*, *supra*, 36 Cal.App.4th at p. 1424; *Terminal Plaza Corp. v. City & County of San Francisco* (1986) 177 Cal.App.3d 892, 900.)

Here, the trial court did not order the City to prepare an EIR relating to the Project, but instead ordered that it conduct further proceedings pursuant to CEQA. There is no question that the City's approval of the Project permits and adoption of the Mitigated Negative Declaration were based on information that was substantially different than that presented in the original draft mitigated negative declaration, the City's initial study for the Project and the underlying RECON and K-H reports relating to biological and traffic/parking impacts, respectively. Standing alone, this would support the trial court's decision to simply return the matter for further proceedings under CEQA.

However, there is also evidence creating a fair argument that the Project may have significant impacts on traffic and parking, biological resources and aesthetics and community character. This evidence requires the preparation of an EIR relating to such impacts rather than a mere reconsideration of whether additional mitigation measures are appropriate. (Pub. Res. Code, § 21080, subd. (d); *Citizens for Responsible & Open Government v. City of Grand Terrace, supra*, 160 Cal.App.4th at p. 1331 [requiring the preparation of an EIR regardless of whether other substantial evidence in the record suggests that no significant impact will result].) Accordingly, we modify the judgment to require that the City prepare an EIR relating to such potential Project impacts.

3. *The Award of Costs to the Taxpayers*

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b); see generally *Santos v. Civil Service Bd.* (1987) 193 Cal.App.3d 1442, 1446 [applying this statute in a proceeding under Code Civ. Proc., § 1094.5].) A party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant in an action where neither party obtains any relief, and a defendant as to whom the plaintiff does not recover any relief qualify as prevailing parties entitled to recover costs. (Code Civ. Proc., § 1032, subd. (a)(4).) Moreover, "[w]hen any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not[.]" (*Ibid.*) We review the superior court's decision that Taxpayers was the prevailing party for an abuse of discretion and will reverse that decision only if it exceeded the bounds of reason. (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 449.) The Appellants bear the burden of establishing such an abuse. (*Ibid*.)

Although Taxpayers obtained nonmonetary relief against the Appellants, the Appellants contend that the superior court abused its discretion in awarding Taxpayers costs because the primary purpose of this action was to stop the sale of Site 653 to Hillel and Taxpayers was not successful in obtaining that relief. However, the extent to which a party achieved its principal litigation objectives is merely one factor to be considered by the court in determining whether that party prevailed in the action. (*Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 986-987.)

In addition, there is ample basis in the record to support the superior court's finding that Taxpayers sufficiently succeeded in achieving its principal litigation objectives here so as to qualify as the prevailing party. A review of Taxpayers' petitions and complaint, as well as the briefs on appeal, establishes that one of the principle purposes (and quite possibly the most important purpose) of this action was to prevent the construction of the student center from going forward without further review of the environmental impacts therefrom in accordance with CEQA. Taxpayers succeeded in achieving that objective and thus the superior court's determination that it was the prevailing party did not exceed the bounds of reason. We similarly reject the Appellants' alternative argument that the superior court abused its discretion in not pro-rating the cost award (the vast majority of which was for the preparation of the administrative record) based on what they refer to as Taxpayers' "extremely limited success."

The Appellants finally make a passing challenge to the reasonableness of the costs awarded for copying and preparing the administrative record. They cite, however, no persuasive authority to establish that the superior court's award of these costs constituted an abuse of discretion. For example, the Appellants' challenge to the court's award of $14,767 in labor costs for 124 hours of attorney time (at reduced rates) and paralegal time to prepare the 8,446 page administrative record is based solely on the fact that City staff took only 55 hours to *certify* the record once Taxpayers prepared it. The proffered comparison is one of apples to oranges and fails to establish an abuse of discretion on the part of the trial court. (See *River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37 Cal.App.4th 154, 180-181 [upholding an award of $10,194.05 in costs for

the preparation of an administrative record of nearly 4,000 pages that included engineer and paralegal time].)

The superior court did not abuse its discretion in awarding Taxpayers $28,264.52 in costs.

II. THE TAXPAYERS' CROSS-APPEAL

1. *The Scope of the Cross-Appeal*

Pursuant to the California Rules of Court, when one party files a timely notice of appeal, any other party may file a cross-appeal within 20 days of notice of the filing of the notice of appeal. (Cal. Rules Court, rule 8.108(f)(1).) Such a cross-appeal, however, must relate to the same judgment or order appealed from in the underlying notice of appeal; to the extent that the cross-appeal attempts to challenge any other judgment or order, the appellate court lacks jurisdiction to entertain it. (*Ibid*.; *Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 976-979, & cases cited therein.)

Here, the Appellants noticed their appeal from the court's September 2007 order granting in part and denying in part Taxpayers' petition for writ of mandate under CEQA and its October 2007 judgment (1) ordering the City to set aside its mitigated negative declaration and its resolutions approving the planned development and site development permits and the right-of-way vacations; (2) denying Taxpayers' second through fifth causes of action; and (3) granting the Appellants' motion for summary adjudication of Taxpayers' sixth and seventh causes of action. Taxpayers noticed a cross-appeal from

"all appealable rulings, orders and judgments, or portions thereof, which were adverse to [it]."

Despite the breadth of the judgment and the notice of cross-appeal, the Appellants argue that because their notice of appeal expressly provided they were not appealing from those portions of the October 2007 judgment that were in their favor, the Taxpayers' cross-appeal cannot raise any challenges as to those portions of the judgment either. This argument is contrary to the law. (Cal. Rules Court, rule 8.108(f)(1) ["[i]f an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal *from the same judgment or order* is extended until 20 days after the superior court clerk mails notification of the first appeal" (italics added); see also *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 295.)

The Appellants also suggest that because the October 2007 judgment did not specifically reference the court's August 2007 order severing the sale of Site 653 from the Project, Taxpayers was required to file a timely notice of appeal (rather than a cross-appeal) to create jurisdiction over that ruling in this court. However, an interlocutory order is not appealable separate from the judgment except as expressly provided by statute and no statute authorizes such an appeal from a severance order made pursuant to Public Resources Code section 21168.9. (Code Civ. Proc., § 904.1, subd. (a).) Accordingly, the only way to properly challenge the superior court's severance order was by an appeal from the October 2007 judgment and Taxpayers' cross-appeal from that judgment is sufficient to establish appellate jurisdiction over that decision. (Code Civ. Proc., § 906 [on appeal from a judgment, "the reviewing court may review . . . any

intermediate ruling . . . which involves the merits or necessarily affects the judgment . . . or which substantially affects the rights of a party"]; compare *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43 [holding that when several orders occurring close in time *are separately appealable*, appellate jurisdiction is created only as to each appealable order that is specifically identified in the notice of appeal].)

For these reasons, we reject the Appellants' contention that the Taxpayers can only challenge those aspects of the September 2007 order and the October 2007 judgment that they appealed from in their underlying notice of appeal.

2. *The Sale of Site 653*

Taxpayers raises two challenges in connection with the sale of Site 653 to Hillel. First, it argues that the City failed to comply with the procedures required under its own Municipal Code for giving such authorization. Second, it contends that the trial court erred in severing the sale from the project for purposes of its CEQA writ rather than setting it aside. We address these arguments in turn below:

A. Compliance with Applicable Procedures

In November 2000, the City Council passed a motion authorizing the City Manager to sell or lease Site 653 to Hillel. Unfortunately, the resolution was thereafter recorded as "authoriz[ing] and empower[ing] [the City Manager] to enter into exclusive negotiations with Hillel . . . for the ground lease of Site 653," without any mention of a possible sale. In May 2006 Hillel entered into the final agreement to buy Site 653 and the City Council adopted a resolution authorizing that sale.

Taxpayers avers that the City failed to comply with its mandatory duties relating to the authorization of the sale of City property pursuant to section 22.0902 of the City's Municipal Code, which provides as follows:

> "Except as otherwise provided in the City Charter, the Council shall sell the real property of the City in compliance with the requirements herein established. No real property belonging to the City shall be sold except in pursuance of a resolution passed by an affirmative vote of five members of the Council, which shall contain the following:
>
> "(a) The reason for selling such real property;
>
> "(b) A description of the real property to be sold;
>
> "(c) A statement of the value of such property as disclosed by an appraisal made by a qualified real estate appraiser . . . ;
>
> ". . . . . .
>
> "(e) A statement that the property *will be sold* by negotiation or by public auction, or by sealed bids, or by a combination of public auction, and sealed bids; providing, however, that in the event that such property *is to be sold* by negotiation, then the reasons therefore shall be included in the resolution." (Italics added.)

Relying on the italicized portion of the ordinance, Taxpayers argues that the City was required to adopt an authorizing resolution prior to negotiating the sale, but that its November 2000 resolution was inadequate, and its May 2006 resolution was too late, to do so and thus the court erred in denying its request for administrative mandamus relief under Code of Civil Procedure section 1085.

We disagree. The language of the ordinance on its face merely requires that the City adopt a resolution setting forth the required statements prior to the time the sale of its property occurs, not necessarily before negotiations for such a sale are undertaken. In

addition, the City's interpretation of this ordinance as requiring the former rather than the latter is entitled to judicial deference. (*Yamaha Corp. of America v. State Bd. of Equalization* (1999) 19 Cal.4th 1, 12 [acknowledging that an agency has intimate familiarity with its own regulations and will have more sensitivity to the practical implications of particular interpretations thereof].)

Moreover, a review of the transcript of the November 2000 City Council meeting clearly establishes that the motion actually made and adopted therein authorized negotiations for either a sale or a lease of Site 653 to Hillel. (To the extent that Taxpayers raises additional challenges to the procedural validity of such a motion in its reply brief, those arguments provide too little and come too late and we decline to consider them. (See *Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 171.)) The superior court did not err in denying Taxpayers' petition for a writ of mandamus to set aside the City's authorization of the sale of Site 653 to Hillel.

B. Severance of the Sale from the Application of the CEQA Writ

Public Resources Code section 21168.9 states in pertinent part:

> "(a) If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following:
>
> "(1) A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part.
>
> ". . . . . .
>
> "(b) *Any order pursuant to subdivision (a) shall include only those mandates which are necessary to achieve compliance with this*

> *division and only those specific project activities in noncompliance with this division*. The order shall be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with this division. *However, the order shall be limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division. . . .*" (Italics added.)

Under appropriate circumstances, the statute authorizes a trial court to fashion a remedy that permits some part of the project to go forward while an agency seeks to remedy its CEQA violations. (*San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (2001) 89 Cal.App.4th 1097, 1104-1105.) In carrying out this authorization, the trial court applies traditional equitable principles. (*Laurel Heights Improvement Assn. v. Regents of University of California, supra,* 47 Cal.3d at pp. 423-424; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 741.) It exercises its sound discretion given the particular circumstances of the case before it and its order will not be modified or reversed on appeal absent an abuse of discretion or an error of law. (See generally *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999; *Union Interchange, Inc. v. Savage* (1959) 52 Cal.2d 601, 606.) An abuse of discretion exists only if the trial court's decision exceeds the bounds of reason or contravenes the uncontradicted evidence. (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1470.)

Taxpayers essentially argues that there is insufficient evidence to support the trial court's factual findings in support of the severance order, to wit, the findings that the sale

of Site 653 was severable from the remainder of the project and that a severance of the sale would not prejudice complete compliance with CEQA.

i. Severability

For purposes of CEQA, a project is defined as "the whole of an action [that] has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment[.]" (Guidelines, § 15378.) Taxpayers contends that because Hillel purchased Site 653 solely to construct the student center thereon and the sale was made expressly contingent on City Council approval of Hillel's applications for the street vacation, the planned development permit and the site development permit, the sale was part of the Project for CEQA purposes. The Appellants respond that the sale is nonetheless properly severable from the Project because the challenged aspects of the Mitigated Negative Declaration pertain only to the construction and operation of the student center, not to the sale, and point out that neither the City's initial study, nor the Mitigated Negative Declaration for the Project, make any mention of the sale.

Although the City noticed the sale of Site 653 and the Project approvals as part of the same hearing, the sale itself does not create physical impacts on the environment and thus is not a matter that must be the subject of environmental review. (See *Citizens to Enforce CEQA v. City of Rohnert Park* (2005) 131 Cal.App.4th 1594, 1599-1601 [city approval of a memorandum of understanding with an Indian tribe regarding the funding of public improvements in connection with the possible development of property into a casino was not a "project" for purposes of CEQA]; *Simons v. City of Los Angeles* (1976)

63 Cal.App.3d 455, 465-466 [voters' approval of an initiative transferring property that had been designated as a public park but used in the preceding 40 years as a police training facility did not require an EIR since the transfer itself was not a "project" for CEQA purposes].) That the sale was conditioned on the City's approval of the Project, which undeniably does require compliance with CEQA, does not render the trial court's decision to sever the sale an abuse of discretion; in fact, the provision making the sale rescindable if such approval is not forthcoming supports the severability of the sale.

ii. Lack of Prejudice

Taxpayers also argues that, even if the sale was otherwise severable, the superior court's decision was an abuse of discretion because the sale of Site 653 makes the acquisition of an alternative site for the student center infeasible, thus prejudicing complete and full compliance with CEQA.

There is no question that CEQA requires public agencies to "consider alternatives to proposed actions affecting the environment" prior to approving such actions. (Pub. Res. Code, § 21001, subd. (g); *Laurel Heights Improvement Assn. v. Regents of University of California, supra,* 47 Cal.3d at p. 400.) To implement this policy, the statutory scheme requires that an EIR identify feasible alternatives that could substantially lessen the significant environmental impacts of a project. (Pub. Res. Code, §§ 21002, 21002.1, subd. (a), 21100, subd. (b)(4).) For purposes of CEQA review, "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Res. Code, § 21061.1; Guidelines, § 15364.)

The Guidelines further specify that an EIR must "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives," focusing on alternatives that would "avoid or substantially lessen any significant effects of the project, . . . even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." (Guidelines, § 15126.6, subd. (a) & (b).) The discussion of alternatives is subject to a rule of reason (*id*. at subd. (f)) and the scope of alternatives to be analyzed must be evaluated on the facts of each case and in light of the statutory purpose. (*Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d at p. 566.)

Here, the sale agreement between Hillel and the City, which closed well before the trial court was asked to rule on the severance issue, provided that the transaction was subject to rescission in the event the City did not approve the Project. In light of this provision, the fact of the sale does not render a consideration of alternative project sites infeasible, a matter the Appellants essentially concede in their appellate briefs.

Although the conditional sale agreement perhaps reflects the City's favorable disposition toward the Project, this fact alone does not violate CEQA. (See *City of Vernon v. Board of Harbor Comrs.* (1998) 63 Cal.App.4th 677, 688 [recognizing that "[i]f having high esteem for a project before preparing an . . . EIR nullifies the process, few public projects would withstand judicial scrutiny"] disapproved on other grounds in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131, fn. 10.) Further,

Taxpayers' assertions about what the Appellants might try to do in the future are purely speculative and fail to establish an abuse of discretion by the trial court. (See *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 777.)

iii. Conclusion

For the reasons set forth above, we conclude that the trial court did not abuse its discretion in severing the sale of Site 653 from the remainder of the Project for purposes of applying the CEQA writ.

3. *Taxpayers' Administrative Mandamus Claims*

The proper means for obtaining judicial review of most public agency decisions is through a proceeding for a writ of mandate, either ordinary or administrative. (Code Civ. Proc., §§ 1085, 1094.5, respectively.) The type of mandate to be sought is determined from the nature of the administrative action or decision to be reviewed (*Tielsch v. City of Anaheim* (1984) 160 Cal.App.3d 570, 574), with quasi-legislative acts subject to review by ordinary mandate and quasi-judicial acts (i.e., those decisions resulting from a proceeding in which the law requires a hearing and the presentation of evidence and vests discretion in the agency as to the determination of facts) subject to review by administrative mandate. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566-567; *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848.)

A. Mandamus Relating to the Rights-of-Way Vacation

Phase II of the Project required the City to vacate a street right-of-way between Site 653 and La Jolla Scenic Drive North and to partially vacate a right-of-way between Site 653 and the 8976 Cliffridge residence. Here, Taxpayers brought a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5 to challenge the City's decision to vacate those rights-of-way, arguing that the City failed to make necessary findings of fact to support that decision. However, the City's vacation decision was quasi-legislative rather than quasi-adjudicatory in nature and thus a challenge to that decision should have been brought under section 1085, rather than section 1094.5, of the Code of Civil Procedure. (See *Citizens for Improved Sorrento Access, Inc. v. City of San Diego* (2004) 118 Cal.App.4th 808, 814, fn. 3 and *Heist v. County of Colusa* (1984) 163 Cal.App.3d 841, 845-849, both rejecting the analysis of *City of Rancho Palos Verdes v. City Council* (1976) 59 Cal.App.3d 869, 882-889.)

Even if we were to deem Taxpayers' challenge to the vacation decision as arising under the appropriate statutory provision, it would in any event fail. Judicial review of an agency decision to vacate a street or right-of-way based on a finding that such street or right-of-way was no longer needed for public use is highly deferential; relief is available only if the challenging party establishes that the decision was "arbitrary, capricious or entirely lacking in evidentiary support." (*Citizens for Improved Sorrento Access, Inc. v. City of San Diego, supra*, 118 Cal.App.4th at p. 814.)

Here, the evidence in the record shows that the rights-of-way in question primarily related to unimproved property and that the City held those rights-of-way as part of a

possible widening of La Jolla Scenic Drive North, but that the rights-of-way were never used, and no longer needed, for that purpose. It also shows that the rights-of-way were not needed for a Class II bicycle lane or desirable as open space and that Hillel's development of the land with landscaping, pedestrian walkways and a bicycle path would benefit the public and eliminate the City's maintenance obligations relating to the Project site as a whole.

This evidence is sufficient to support the City's decision to vacate the rights-of-way. (Sts. & Hy. Code, § 8324, subd. (b) [allowing vacation where the public agency finds that the street or right-of-way "is unnecessary for present or prospective public use"].) Because that decision was neither capricious nor arbitrary, the trial court correctly denied Taxpayers' petition to set it aside.

4. *Taxpayers' Waste Claims*

A. Application of the Exclusive Remedy Doctrine

A proceeding for a writ of administrative mandate generally provides the exclusive remedy for judicial review of a quasi-adjudicatory action of a local level agency. (*City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718-719; see *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 645-649.) Thus, administrative mandamus is the exclusive vehicle for challenging the accuracy or adequacy of a CEQA document, barring a civil action for damages based on an agency's failure to prepare a proper EIR. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 722, disapproved of on another ground in *Briggs v. Eden Council for Hope Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10.) Similarly, an action

for damages cannot be based on an administrative decision revoking a conditional use permit. (*Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 448.) This same rule, which the parties herein refer to as the doctrine of exclusive remedy, has been applied in a wide variety of contexts where administrative mandamus relief is available. (See *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1720, 1729 [denial of tenure]; *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 976 -978 [similar]; but see *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 716-717 [allowing a claim for damages against a City for demolition of a building despite the fact that the City's decision declaring the building to be a nuisance was subject to challenge under Code of Civil Procedure section 1094.5; no argument regarding the exclusive remedy doctrine was raised]; *Laguna Village, Inc. v. County of Orange* (1985) 166 Cal.App.3d 125, 128 [recognizing a limited exception to the rule of exclusivity].)

As Taxpayers points out, this rule of exclusivity of remedy is limited to agency decisions that are subject to challenge by administrative mandamus and is not applicable to decisions subject to challenge by ordinary mandamus. (See *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 160, 168-169; *Briggs v. City of Rolling Hills Estates, supra*, 40 Cal.App.4th at pp. 646-649; compare *McDaniel v. Board of Education* (1996) 44 Cal.App.4th 1618, 1622 [holding that ordinary mandamus relief under Code of Civil Procedure section 1085 is not a prerequisite, much less the exclusive remedy, for governmental decisions subject to review thereunder].) This limitation in the application of the doctrine is based on the notion that quasi-judicial decisions are entitled to deference and that suits for damages are permissible only where the governmental

action is subject to review on the basis of a legal standard. (*Harman v. City and County of San Francisco, supra,* 7 Cal.3d at p. 160, & cases cited therein; see also *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 224-226 [allowing a claim for damages against a city for failing to comply with its duty under CEQA to complete and certify an EIR within one year of its receipt of a completed project application].)

Applying the foregoing principles, the question becomes whether the action being challenged by Taxpayers' sixth and seventh causes of action (i.e., the decision to sell Site 653 to Hillel) is a quasi-judicial in nature. It is not. (*Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303 [a governmental agency's decision to enter into a contract, and all acts leading up thereto, are legislative in character]; see *Friends of the Sierra Railroad v. Tuolomne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 652; *Joint Council of Interns & Residents v. Board of Supervisors* (1989) 210 Cal.App.3d 1202, 1211-1212 [recognizing that a governmental agency decision to enter into a contract necessarily requires an exercise of discretion guided by considerations of public welfare and that the mere fact the proceedings leading up thereto possess certain characteristics of the judicial process does not change their quasi-legislative nature].) The trial court's summary adjudication of the sixth and seventh causes of action in Appellants' favor based on the contrary conclusion was thus erroneous and must be reversed.

DISPOSITION

The judgment is reversed insofar as the trial court granted summary adjudication of Taxpayers' sixth and seventh causes of action and is modified to require the City to

prepare an EIR relating to potential impacts of the Project on traffic and parking, biological resources and aesthetics and community character. The judgment in all other respects is affirmed. The trial court is to issue a modified judgment and writ of mandate consistent with this opinion. Taxpayers is awarded its costs of appeal.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.